No. 92-65

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In The

Supreme Court of the United States

October Term, 1992

SUN CARRIERS, INC.; ALBERT L. LABINGER; DONALD E. MAYORAS; MILNE TRUCK LINES; ELLIOTT BURNSIDE; CHARLES N. PASS; THOMAS MORTON; JAMES BRADFORD; ST. JOHNSBURY TRUCKING; JONES TRUCK LINES; RIORDAN FREEMAN & SPOGLI; RICHARD J. RIORDAN; BRADFORD M. FREEMAN; RONALD P. SPOGLI,

Petitioners,

vs.

MILNE EMPLOYEES ASSOCIATION, a non-profit Mutual Benefit Corporation, or in the alternative STEVEN BISHOP, CHARLES E. THARP, DEBRA BISHOP and ELLA THARP, as representatives of the class of affected former employees of MILNE TRUCK LINES, INC., and their spouses,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Should federal labor laws be interpreted to alter radically the constitutional balance enshrined in the concepts of federalism by supplanting any and all state law regulation of matters peripheral to the labor-management bargaining relationship — such as laws providing causes of action for fraudulent misrepresentations and concealments arising outside of any collective bargaining?

II. Can an employer properly conduct a successful defense before the NLRB against unfair labor practice charges and later claim *Garmon* preemption against a state-law suit arising from the same factual setting as that which gave rise to the NLRB complaint?

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STATEMENT OF THE CASE

Respondents present this Statement of the Case for the purpose of correcting petitioners' mischaracterization of their case and the allegations appearing in their state-law complaint.

Respondents are Milne Employees Association (herein "MEA") and, alternatively its officers and directors as proposed class representatives. MEA was formed for the purpose of conducting this litigation on behalf of its members, 614 former employees of petitioner Milne Truck Lines, Inc. ("Milne" or "Milne Truck" hereinafter) and 480 spouses of those employees who assert claims for spousal injury or loss of consortium. Forty-eight of the former employees were in managerial or other nonunion positions not covered by a collective bargaining agreement ("CBA" herein) (App. 2a-3a). MEA originally filed its claims in the California Superior Court. Defendants removed the case to federal court claiming complete immunity from suit under federal labor law preemption (App. 4a).

This writ proceeding involves only the state-law tort claims of the former union employees (and their spouses) of petitioner Milne. The claims of the nonunion former employees of petitioner Milne were severed by the district court, remanded to state court (App. 4a) and there are proceeding.

Milne Truck is the only petitioner which signed or was covered by any CBA with the unions representing members of MEA. In the 50 years before 1980, Milne Truck was an independent trucking company operating in the Western United States (App. 3a). In 1980, petitioner Sun Carriers, Inc. ("Sun") acquired petitioner Milne in a leveraged buy-out, and Milne became a subsidiary of petitioner Sun (App. 3a). On September 29, 1986 all of the stock of petitioner Sun was sold to the officers of petitioner Sun and petitioners Riordan, Freeman, and Spogli. *Id.*

Respondents' well-pleaded complaint alleges that after the LBO and up until September 1987 all of the petitioners conspired in a secret plan to liquidate the assets of Milne Truck in order to assist Sun and the Riordan partnerships to pay down their massive debt assumed in the buy-out of Sun. *Id.*

Respondents complain that all petitioners engaged in a protracted campaign of deception and fraud to effectuate their secret plan to liquidate Milne Truck. The complaint asserts that in January 1987 Milne Truck began a massive reduction of its sales force which was falsely announced as a "refocus" of sales activities. *Id.* Such reductions produced widespread rumors in the trucking industry and throughout Milne Truck's workforce of its imminent closing. *Id.*

In response to those rumors, petitioners visited Milne Truck's various terminals in an effort to calm the workforce and to put such rumors to rest. *Id.* In those meetings,petitioners made and presented videotapes (shown to all members of MEA) promising job security, asking the respondents not to seek other work, and asking the respondents to have faith in the group controlling Sun Carriers. *Id.*

On August 1, 1987 Milne Truck announced the sale of its Wyoming terminal. In response to increased apprehensions by it employees, petitioners falsely claimed that sale was "only a revamping" of operations and that Milne Truck would continue there. On August 21, 1987 Milne Truck sold another terminal, again representing that its operations would continue as normal but "blended" with other Milne Truck terminals in Northern California. *Id.*

Finally petitioners revealed their hidden cards. In a letter dated September 8, 1987 Petitioners demanded that the Teamsters

(which represented most MEA members) grant major concessions on wages and benefits. *Id.* Petitioners required that those concessions be agreed to within three days or all Milne Truck's operations would be closed. *Id.* On or about September 11, 1987, Petitioners completed their conspiracy of fraud and misrepresentation by closing down Milne Truck and liquidating its assets. *Id.*

On September 8, 1988 respondent MEA and the alternative representatives of the proposed class filed their complaint in the Superior Court of the State of California. They asserted seven state-law tort actions, including fraud by intentional misrepresentation of facts, fraud by suppression of facts, negligent misrepresentation of facts, and intentional infliction of emotional distress; respondents also sought the equitable remedy of imposition of constructive trust (App. 3a-4a).

The complaint specifically disclaimed any reliance on any portion of any CBA. No CBA even addressed the eventuality of a total plant closure. The suggestions of petitioners that the CBAs "address the rights and duties attendant to plant closure" (Petition at 3) or that a CBA might be so interpreted (*id.*) are without factual foundation and contrary to the factual analysis engaged in by the Ninth Circuit. *See Milne Employees Ass'n v. Sun Carriers*, 960 F.2d 1401, 1409-10 (9th Cir. 1991).

On removal, the district court held all claims by the union employees preempted by § 301 of the Labor Management Relations Act, (LMRA), 29 U.S.C. § 185. The district court denied the § 301 preemption claim as to the non-union employees' state-law causes. The district court denied, as to all employees, petitioners' claim that the *Garmon* doctrine preempted the state-law causes. *See MEA v. Sun Carriers*, 714 F. Supp. 1028 (N.D. Cal. 1989).

The Ninth Circuit reversed the § 301 preemption rulings on the union employees' claims for fraud and intentional infliction of emotional distress; it remanded these claims to the district court for a determination whether remand to state court was required. *Milne Employees Ass'n v. Sun Carriers*, 960 F.2d at 1418. The Circuit upheld the district court's rulings in all other respects. *Id.* Specifically, the appeals court found after additional requested briefing that the claims for fraud and intentional infliction of emotional distress ***arising out of the fraudulent conduct*** were not preempted by the *Garmon* doctrine. *Id.* Contrary to petitioners' contention (Petition at 7)respondents have abandoned on appeal neither their spousal claims nor their request for imposition of a constructive trust. *Milne Employees Ass'n*, 960 F.2d at 1405, n.3. Rather, those purely derivative claims were not germane to the appeal.

One particular distortion merits special mention. Petitioners claim that Milne Truck's operations "lost several million dollars" after their leveraged buy-out (Petition at 6). This is unsupported in the record; petitioners first alleged such losses only after respondents filed their complaint. This ***concealment*** of heavy losses — if indeed such occurred — lies at the heart of respondents' complaint (App. 3a).

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT CORRECTLY APPLIED THE § 301 PREEMPTION ANALYSIS REQUIRED BY PRECEDENTS OF THE COURT IN REFUSING TO FIND PREEMPTED FOUR OF RESPONDENTS' CAUSES OF ACTION.

The Court in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S.

399 (1988) enunciated a clear, bright-line test for resolution of federal labor law defenses based upon alleged preemption under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). "To determine whether a state law claim is completely preempted under section 301, the relevant inquiry is whether resolution of the claim requires interpretation of a collective bargaining agreement." *See Milne Employees Ass'n*, 960 F.2d at 1408. This correctly reflects the test enunciated by this Court in *Lingle, supra*, and is a faithful expression of the congressional intent in enacting this statute. The legislative history of the Taft-Hartley Act leaves unmistakable the inference that Congress never intended to supplant all state regulation in the labor field done under the exercise of the states' police powers. *See* H. R. Rep. No. 245, 80th Cong., 1st Sess. for the report of Congressman Hartley ("makes labor organizations equally responsible with employers for contract violations and provides for suit by either against the other. . . ."). *Accord* S. Rep. No. 105, 80th Cong., 1st Sess. at 15-17 (1947) (Sen. Taft), *cited in Dowd Box Co. v. Courtney*, 368 U.S. 502, 511-13 (1962).

Beyond creating a federal jurisdictional vehicle for suing unions in federal court for CBA breaches, the Court has identified two other intents of the Congress in enacting § 301. The second intent was to promote collective bargaining that ends with agreements not to strike by authorizing federal courts to fashion a body of federal law for enforcement of CBAs. *See Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451, 454-55 (1957). The third congressional intent discerned in the jurisprudence of this Court was to promote uniformity of interpretation and to avoid unpredictability in the interpretation of phrases and clauses in CBAs. *Teamsters v. Lucas Flour*, 369 U.S. 95, 102-04 (1962). None of these legislative purposes is implicated or affected to the slightest degree by allowing California and other states to regulate frauds and deceits practiced by employers upon unionized employees. Respondents recognize that other federal labor law principles may preempt state law even though § 301 preemption is not applicable. *See Lingle*, 486 U.S. at 408 and n.8. Petitioners

make no claim of *Machinists* preemption or of ERISA preemption. Their contentions regarding *Garmon* preemption were the subject of lengthy and careful analysis by the Ninth Circuit. Respondents address same at III, *infra*.

While this Court in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), found preemption of a contract-based state-law tort (bad faith handling of an insurance claim), the Court has been careful in its jurisprudence to limit the scope of *Lueck* to that necessary to promote the interests of "interpretative uniformity and predictability". *Id.* at 210-11. Congress has never exercised its authority to occupy the entire field of labor legislation. *Id.* at 208-09. The *Lueck* Court carefully bore in mind that the courts are cautioned not to extend the preemptive effect of 301 beyond suits for breach of contract because any such extension would be inconsistent with the congressional intent. *Id.* at 212. It is instructive that the Court found preemption in *Lueck*, not because it was a "bad-faith" tort, but rather because the right underlying that remedy and the duty whose breach gave rise to the state-law claim existed only by implication from the express terms of the union contract. *Id.* at 213-218.

What the Ninth Circuit has done here was to follow the dictates of *Lueck* and *Lingle* by engaging in a careful analysis of each element of each of the four state-law causes of action which it found not preempted. *Milne Employees*, 960 F.2d at 1407-10. The Ninth Circuit concluded:

> In sum, none of the elements of the fraud, misrepresentation, or suppression claims requires interpretation of the collective bargaining agreements.

Id. at 1409. Contrary to the misconceived argument of petitioners (Petition at 13) the duty to disclose which underlies Count II of

respondents' complaint has its source entirely in California state law, not in any of the CBAs between Milne Truck and its unions. *Milne Employees*, 960 F.2d at 1408 (citing to California jurisprudence). Respondents request that the Court note that the Ninth Circuit found that 301 preempted their claims for intentional infliction of emotional distress, except insofar as those claims were based upon fraud and suppression of facts. *Id.* at 1412-13.

In performing the element-by-element analysis of Respondents' seven pleaded tort claims, the Ninth Circuit exercised scrupulous care to preempt all claims for which any element even arguably was not completely "independent" of the CBAs. *Lingle*, 486 U.S. at 410, n. 10.

As a matter of fact, petitioners were given the benefit of every doubt by the Ninth Circuit concerning whether any element of respondents' claims might not have been truly "independent" within the meaning of *Lingle*. As in *Lingle*, each element of all of the state-law tort actions held not preempted presented "purely factual questions" which pertained to the conduct of the employee and the conduct and motivation of the employer. None of the elements of the California substantive law presented by these four causes of action requires a court to interpret any term of a CBA.

> Thus, the state-law remedy in this case is "independent" of the collective-bargaining agreement in the sense of "independent" that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement.

Lingle, 486 U.S. at 407.

Respondents note that the Court in *Lingle* held that

"parallelism" in state-law analysis did not render the state-law dependent upon the CBA. Nevertheless the Ninth Circuit held that all three of Respondents' California tort claims which the Circuit Court characterized as "contract-based" were preempted by § 301. *Milne Employees*, 960 F.2d at 1410-12. Respondents would submit that in these aspects the Ninth Circuit opinion gave undue deference to its own precedents and to certain fragments of the literal language of *Lueck* by finding preempted the claims for interference with contractual relations, interference with prospective economic advantage, intentional infliction of emotional distress by the terminations, and breach of the implied covenant of good faith and fair dealing. The Circuit Court likewise did not give full application to the bright-line test of *Lingle* in finding that respondents' claims for intentional infliction of emotional distress were preempted insofar as they were based upon termination of the employment relationships. *Id.* at 1412-13. Intellectually rigorous application of the *Lingle* test for preemption would have required a contrary result as to these latter claims. But they turn principally upon precise definitions of California state-law elements. Since the decision of the California Supreme Court in *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988), at least one of these preempted causes of action has been rendered moot as to MEA's unionized members. Therefore the Ninth Circuit's decision presents no special and important reasons for granting the Petition for Writ of Certiorari. Nothing has occurred in the Ninth Circuit's handling of this cause which calls for an exercise of this Court's power of supervision. *See* S .Ct. R. 10.1.

The questions of federal law about which petitioners purport to raise good-faith questions have been fully settled by recent decisions of the Court. Given what the Ninth Circuit referred to as "the unique facts alleged in this case", *Milne Employees*, 960 F.2d at 1410, there is no reason for the Court to revisit its recent decisions under § 301 of the LMRA.

II.

THE DECISION BELOW PRESENTS NO ISSUE OF NATIONAL IMPORTANCE.

The Ninth Circuit decision here decides no question of federal law which has not been already settled by this Court. The portions of the decision below which petitioners cite as grounds for issuance of a writ of certiorari do not conflict with any applicable decision of this Court. Thus it is difficult to comprehend the true intention underlying petitioners' second argument. *See* S. Ct. R. 10.1(c). Respondents have no quarrel with the policies embodied in such decisions as *Lucas Flour, Lincoln Mills,* or *Dowd Box Co.* Respondents do, however, take strenuous exception to the actions of petitioners in attempting to blur the distinction between the older line of § 301 cases, which dealt with uniformity of interpretation of CBAs and their enforcement, and the Court's later cases which guided the Ninth Circuit. Petitioners would blithely disregard the clear policy of this Court expressed in such decisions as *Caterpillar, Inc. v. Williams,* 482 U.S. 386 (1987), *Lueck* and *Lingle* that unionized employees are not to be deprived of their independent state-law rights merely because they happen to work under a CBA. In finding free from § 301 preemption certain of respondents' tort claims, the Ninth Circuit has done nothing of national importance. To the contrary, it has demonstrated its fidelity to the principle of § 301 preemption developed in *Lucas Flour, Lueck,* and *Lingle*. State laws whose application might lead to inconsistent results are preempted because of the necessity for national uniform interpretation and application of federal labor law principles. *Lingle,* 486 U.S. at 406.

Here the Ninth Circuit determined that all of the elements of the tort claims on which it has permitted respondents to go forward present purely factual questions relating to conduct and motivation which require no interpretation of any term of a CBA. *Id.* at 407.

Petitioners imply that somehow the respondents' claims could have been the subject of grievance and arbitration. The record is devoid of any substance for that claim. But, even if petitioners' conduct toward respondents had been arbitrable, *i.e.*, assuming *arguendo* that some hypothetical clause of the CBAs might have implicated the same analysis of the facts as would an inquiry under petitioners' fraud claims, the California tort claims would still be "independent" for § 301 preemption purposes since they can be resolved without interpreting any CBA. *Id.* at 408-10. It is doubtful at best whether a union could contract to waive its members independent state-law rights when they are of such fundamental importance as those embodied in Cal. Civ. Code §§ 1708, *et seq.* It is abundantly clear that there is no evidence of any such waiver in this case. Respondents note that the plaintiff in *Lingle* enjoyed explicit rights under the CBA signed by her union which closely paralleled her right under Illinois tort law which this Court found not to be preempted. 486 U.S. at 401, 407-10.

Petitioners' repeated invocation of *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965) is somewhat mystifying in this context. *Republic Steel* dealt with the application of state law to collect severance pay provided for under a CBA. The Ninth Circuit in applying the proper § 301 analysis to find these fraud claims not preempted has done nothing to "sidestep" any CBA. Nor have respondents. Petitioners' claim here that a writ of certiorari should issue implicitly rests on their studied avoidance of the truly "independent" nature of the state-law rights which the Circuit Court has ruled respondents may seek to vindicate in court.

Under the rulings of the Court it would appear that respondents are entitled to a presumption against permitting § 301 to preempt the State of California's police power regulations expressed in §§ 1708-1711 of its Civil Code. *See Cipollone v. Liggett Group Inc.*, 112 S. Ct. 2608, 2617-18, 2620-21 (1992). Petitioners can show no evidence at all, much less clear and

unambiguous evidence that Congress intended the California common-law damages actions at issue here to be preempted by § 301. Indeed, only by resort to the principles of implied preemption have the prior decisions of the Court found a congressional intent in § 301 to preempt this field even partially. 112 S. Ct. at 2625-26, 2629 (concurring opinion of Justice Blackmun). While the precise contours of this presumption remain to be defined precisely, and its existence subject to some debate, *Id.* at 2632-34 (dissenting opinion of Justice Scalia), it would appear beyond question that respondents are entitled to the benefit of such a presumption in light of the specific language of § 301 which completely lacks any express preemption language. *Id.* at 2624.

In their labors to contrive preemption where the precedents of this Court permit none, Petitioners have lost sight of the "interstitial" nature of federal labor law. *See Metropolitan Life Ins. Co. v. Mass*, 471 U.S. 724, 756 (1985). The independent rights on which respondents have sued have existed in California since 1872; there can be no reasonable doubt that the regulation of deceit and fraudulent conduct is deeply rooted in local tradition. The positions urged upon the Court by petitioners call to mind the philosophy expressed by the Court regarding interpretation of federal labor laws:

> It would *turn the policy* that animated the Wagner Act *on its head* to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.

Id. (emphasis supplied). It is apparent that petitioners' true motive

in seeking the Writ of Certiorari is to persuade the Court to effect a major re-working of federal labor law. Their contentions, in reality, are aimed not at the Ninth Circuit opinion here, but rather at numerous precedents of this Court and the Circuit Court's application of those cases, especially *Lingle*.

III.

THE NINTH CIRCUIT'S DECISION THAT RESPONDENTS' STATE-LAW CLAIMS FOR FRAUDULENT CONDUCT INCLUDING EMOTIONAL DISTRESS DAMAGES WERE NOT PREEMPTED UNDER THE *GARMON* DOCTRINE BECAUSE THOSE CLAIMS AROSE OUT OF CONDUCT OUTSIDE OF COLLECTIVE BARGAINING IS CONSISTENT WITH THE COURT'S JURISPRUDENCE AND RULINGS OF THE OTHER CIRCUITS.

Both the district court and the Ninth Circuit, on original appeal and after additional briefing, rejected the same arguments repeated by petitioners to this Court on the question whether respondents' state-law claims are preempted under the doctrine of *San Diego Bldg Trades Council v. Garmon*, 359 U.S. 236 (1959).

As a preliminary matter, respondents note that, although petitioners assert the Ninth Circuit's decision conflicts with precedents of this Court, petitioners fail to point out even one departure from the Court's *Garmon* rulings. Indeed, the Ninth Circuit's decision rejecting *Garmon* preemption effortlessly flows from the progeny of *Garmon* in this Court. *See*, for example, *Belknap Inc. v. Hale*, 463 U.S. 491 (1983) (holding a state-law fraud claim not preempted by Garmon); *Farmer v. Carpenters*, 430 U.S. 290 (1977) (rejecting *Garmon* preemption of a claim for intentional infliction of emotional distress under California law); *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978) (holding *Garmon* did not preempt a state-law trespass claim against a

union); and *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) (rejecting a claim of *Garmon* preemption against a state-law defamation claim alleging false statements).

There is no conflict between the Circuits as to application of the *Garmon* doctrine to state-law fraud. The cases endlessly cited by Petitioners from various Circuits are clearly distinguishable on their salient facts from the state-law claims asserted by respondents. All respondents' claims involve conduct occurring outside of any collective bargaining. The Ninth Circuit and the district court correctly rejected the "direct-bargaining" and other inapposite cases cited by petitioners.

It is critical one remain cognizant that the Ninth Circuit's ruling here on *Garmon* preemption sets forth no new, bright-line test or rule to be employed in every fraud case. Rather, the opinion below is a proper application of this Court's *Garmon* jurisprudence to this unique factual scenario. This decision of the Ninth Circuit is easily reconciled with *Garmon* rulings from the other Circuits.

A. The NLRB Specifically Rejected Unfair Labor Practice Charges By The Representative Unions Before The State-Law Complaint Was Filed. Therefore The State Court May Exercise Jurisdiction Over The Conduct Alleged In The Complaint That Is Not Covered By Federal Labor Laws.

Garmon gave clear guidelines to resolve a preemption defense where the NLRB has heard charges and found no unfair labor practice. The Court held that, if the Board finds the conduct charged not to be prohibited by § 8(a) of the NLRA, 29 U.S.C. §§ 157-158, then the states may exercise jurisdiction over the employer's conduct. 359 U.S. 245-46. See also, id. at 253 (Justice Harlan concurring) ("Henceforth the States must withhold access to their courts until the [NLRB] has determined that such unprotected conduct is not an unfair labor practice. . .").

In *Garmon* the Court held the state-law claims preempted because the NLRB had not adjudicated the status of the union's conduct to determine whether the picketing was a protected, concerted activity. *Id.* at 246. Here, in contrast, the NLRB has spoken and found no unfair labor practice.

In late September and October 1987, three unions representing respondents filed separate unfair labor practice charges with the Board alleging Milne Truck failed to bargain ("bad faith" bargaining) about petitioners' intent to close operations and about Milne Truck's deadline proposal for wage and benefit reductions.

After investigation the NLRB Regional Director rejected allegations of unfair labor practices because of insufficient evidence Milne Truck had repudiated its CBA or engaged in unlawful direct bargaining with its employees. Put another way, the Board has already found that petitioners "satisfied" their "duty" under the federal labor laws "to bargain in good faith" about the closure of its operations. *See Milne Employees*, 960 F.2d at 1415.

California therefore is not precluded from adjudicating violations of Petitioners' duties arising solely under its law, where those duties do not present a controversy identical to that ruled by the NLRB. Matters not identical to those ruled by the Labor Board (and thus not "arguably" unfair labor practices) are subject to state-law regulation. *Belknap v. Hale*, 463 U.S. at 510. California's anti-fraud statutory scheme, in existence long before the federal labor laws, is a permissible regulation of fraudulent conduct occurring outside any collective bargaining. *See* Cal. Civ. Code §§1708, *et seq.*

B. These State-Law Claims Are Not Identical To The Unfair Labor Practice Charges Presented To The NLRB. Hence Respondents' State-Law Claims Arising From Conduct Outside Collective Bargaining Are Not Preempted By *Garmon*.

Garmon preemption exists to protect the primary jurisdiction of the NLRB to determine in the first instance what conduct is prohibited or protected by the NLRA. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. at 213 n.9. Thus, The "critical inquiry in applying the *Garmon* rules...is whether the controversy presented to the state court is *identical* with that which could be presented to the Board". *Belknap, Inc. v. Hale*, 463 U.S. at 510 (emphasis added), *citing Sears, Roebuck*, 436 U.S. at 197. If the controversy presented to the state court is *different* from that which was presented to the Board, the state-law claim is not preempted under *Garmon*. *Id.*

There need be only subtle differences between the causes of action presented to the state court and the charges before the NLRB to avoid *Garmon* preemption. The Court in *Sears, Roebuck* noted: "Although the arguable federal violation and the state tort *arose* in the *same factual setting*, the respective controversies presented to the state and federal forums would not have been the same". 436 U.S. at 196-97 (emphasis added). Respondents direct the Court's attention to its careful delineations between the state-law claims and unfair labor practice charges set forth in *Sears Roebuck*, 436 U.S. at 197-98, *Farmer*, 430 U.S. at 305, and *Linn*, 383 U.S. at 61-63.

Here, the NLRB was presented with an entirely different controversy for *Garmon* purposes than MEA alleged in its state complaint. The charges to the Board alleged unfair labor practices in the refusal of Milne Truck to bargain about its decision to close all its 33 terminals unless its proposal for immediate wage and benefit concessions was accepted. In short, the issue before the

Board was whether Milne's actions were indicative of an anti-union animus.

By contrast, respondents' complaint principally alleges violations of California statutory law of general applicability proscribing fraud and deceit. It directly implicates California interests in protecting its citizens from fraud. The factual issue to be decided in MEA's state suit is whether petitioners made oral, written and video misrepresentations of job security to quell the rumors of imminent plant closing and to prevent a mass exodus of employees (through false inducements or suppression) when petitioners knew or had reason to know such were false. No collective bargaining about the plant closing was underway when petitioners' wrongful conduct occurred. MEA's suit does not question whether the defendants should have collectively bargained about their secret plan to close. The Ninth Circuit thus properly found that *Garmon* does not preempt here because the complaint raises issues not identical to the controversy the NLRB decided. *See Belknap*, 463 U.S. 510 (fraud claim not preempted by *Garmon*); *Windfield v. Groen Div.*, 890 F.2d 764, 770 (5th Cir. 1989) (fraud claim by a "union organizer" not preempted by *Garmon*); and *Wells v. General Motors Corp.*, 881 F.2d 166, 171 (5th Cir. 1989), *cert. denied*, 495 U.S. 923 (fraud claims not arising out of collective bargaining not preempted).

> *1. Petitioners Had No Duty Under Federal Labor Law To Bargain About The Decision To Close Their Operations So It Could Not Arguably Be An Unfair Labor Practice For Them To Fail To Bargain About Their Secret Plan To Close And Intentionally Deceive Respondents. But Such Fraudulent Conduct May Violate State Duties Existing Independently Of The Employer-Employee Relationship.*

At 19-20 of their Petition, petitioners would now content they *arguably* committed an unfair labor practice by failing to bargain about their decisions to close Milne Truck and to conceal that decision from the employees through fraudulent mis-

representations. That claim fails to create *Garmon* preemption for two reasons.

First, the NLRB already rejected unfair labor practice charges arising out of the closure and petitioners' alleged failure to bargain about that decision. Second, employers have no duty to collectively bargain over a decision to close plant operations. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). *Ipso facto*, an employer does not have a duty to bargain about having misrepresented its decision to close down operations - *e.g.*, promising employees their jobs are secure and the business will not close. An employer's failure or refusal to bargain over a non-mandatory subject is not an unfair labor practice. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Thus, not even arguably could petitioners have committed an unfair labor practice by not bargaining about their misrepresentations of their decision to close. Nor could they have done so by not bargaining about their secret plan itself. It smacks of the crudest form of sophistry for petitioners to attempt to hide behind the labor laws to avoid claims for violations of independent state-law rights when their reprehensible conduct flaunted all legal norms.

This is not to say petitioners' conduct is immunized from sanction. The Ninth Circuit cogently set forth the applicable California statutory and common law proscribing petitioners' pattern of intentional, deceitful acts. *See Milne Employees*, 960 F.2d at 1408, 1412. That state law imposes independent duties on all persons generally.

> *2. Respondents' State-Law Claims Do Not Implicate Direct Bargaining" With Employees, Nor Do They Involve Promises To Induce The Employees To Circumvent Their Representative Unions. Rather, These Fraudulent Misrepresentations Made To Dispel Rumors Of Closing Had No Relationship To Collective Bargaining.*

Petitioners claim at page 21 of the Petition that their

misrepresentations to MEA members were unfair labor practices as "direct bargaining" with the plaintiff class. But the law is clear that not all employer communications to employees are impermissible direct bargaining.§ 8(c) of the NLRA permits an employer to communicate to employees "any views, argument, or opinion" so long as the "expression contains no threat of reprisal or force or promise of benefit", such as forcing the employees to reject the union as their representative or presenting them with a Hobson's choice for an anti-union motive. *NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 133 (2d Cir. 1986).

An unfair labor practice arises only when the employer's communication "attempts to coerce the employees, or to portray the employer rather than the union as the workers' true protector...". *Id.* at 134. Thus, no "direct bargaining" occurs where the employer "never directly said - nor even implied that the workers would be better off without the union". *Id.* at 135.

No provision of the NLRA was intended by Congress to privilege an employer's voluntary misrepresentations to employees of job security that are tortious under state law. *See Belknap, Inc. v. Hale*, 463 U.S. at 512; *Windfield v. Groen Div.*, 890 F.2d at 770 (applying to a union employee's fraud case the *Belknap* holding that fraud claims are not preempted by *Garmon*).

Here respondents alleged no anti-union motive behind petitioners' intentional misrepresentations of future job security. Petitioners have come forward with no evidence of their intent to coerce the employees to abandon the unions as even part of their reason for their intentional frauds. Petitioners thus failed in their burden to prove a basis for *Garmon* preemption. *See Int'l Longshoreman's Ass'n v. Davis*, 476 U.S. 380, 395 (1986).

Most significantly, the NLRB already has rejected that same claim and found Milne Truck did not engage in unlawful direct

bargaining (App. 25a-26a). Petitioners' chameleon-like efforts to contradict the Board's finding in their favor and to foist their switch as a shield against petitioners' claims is disingenuous. The doctrine of judicial estoppel prevents them from doing that.

Petitioners' argument that any employer communication with employees about future job security is impermissible direct bargaining falls flat on its face. In *J.I. Case Co. v. NLRB*, 321 U.S. 332, 339-40 (1944) the Court held that employers may enter into individual contracts of employment directly with employees without committing an unfair labor practice so long as the employer does not refuse to bargain with the representative union because of the individual contracts. *Accord Caterpillar v. Williams*, 482 U.S. at 395-96 (1987). Here, MEA made no allegation and petitioners offered no proof that Milne Truck ever refused to negotiate with the Teamsters or Machinists unions representing respondents because of or in conjunction with petitioners' fraudulent promises of secure employment.

With the inapposite case of *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944), heavily relied on by petitioners, the Ninth Circuit dealt easily. *See* 960 F.2d at 1417. In *Medo Photo*, the employer directly bargained with the employees while at the same time negotiating with their union intending to coerce the employees into rejecting the union as their representative. 321 U.S. at 684. Here, by contrast, no negotiations were underway when petitioners made their misrepresentations, and the NLRB flatly rejected the unions' contention that they were ignored by finding no duty of Milne Truck to bargain with them. Respondent MEA has not alleged, nor have petitioners proven that a motivation for the misrepresentations was to coerce the employees into rejecting the unions as their representatives. Petitioners allege that the Ninth Circuit's ruling will "permit piecemeal agreements with employees". *See* Petition at 23. That claim is disingenuous. This

case is not about separate, bargained-for agreements between employees and their employer without the union for the purpose of cutting the union out of negotiations. Rather, this conduct involves *lies* made directly to employees to keep them working on their jobs until petitioners could complete their scheme to loot Milne Truck's assets. There occurred no give-and-take between Milne and the respondents without the unions to reach an "agreement" contrary to the applicable labor contracts.

C. The Ninth Circuit's Decision In No Way Conflicts With Cases Cited By Petitioners From Other Circuits Since Those Cases Are Factually Distinguishable From The Matters *Sub Judice*; The Decision At Bar Is A Logically Sound Application Of *Garmon* And Its Progeny.

Petitioners principally rely on *Parker v. Conners Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066. That case was properly distinguished by the Ninth Circuit as not controlling here. *See* 960 F.2d at 1415-16. In *Parker*, the former employees alleged that the company and their union committed fraud *during negotiations* regarding the employer's decision to close the plant. That fraud arose out of two employee *concession agreements* and a third *negotiating session between the company* and the union *also* seeking further wage and benefit concessions. Id. at 1514. Additionally, the employees in *Parker* filed charges with the NLRB alleging that the same conduct in their state-law complaint constituted unfair labor practices. *Id.* at 1517.

The key facts here are diametrically opposite. MEA's complaint alleges no fraud or misrepresentation arising out of any collective bargaining or negotiating. There were never any labor negotiations about the decision of Milne Truck to close all of its operations (none were required). Unlike *Parker*, the NLRB here reached the merits of the unions' unfair labor practice charges and

found them baseless. For the same reasons, petitioners' reliance upon *Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986) is misplaced. That case, too, properly was found inapposite by the Ninth Circuit. *See* 960 F.2d at 1416.

The salient facts here are incongruent with those of *Serrano* or *Parker*. Respondent MEA alleged that petitioners made affirmative, fraudulent statements *directly to the employees*. These frauds and misrepresentations occurred outside of any collective bargaining. Therefore, defendants' conduct could not constitute unfair labor practices. As the Court noted in *Garmon*, every case involving a question of *Garmon* preemption must be decided upon its own facts. 359 U.S. at 241. The Ninth Circuit properly found the unique facts here provided no basis for *Garmon* preemption.

D. Petitioners Propose A Radical Restructuring Of Federal Labor Law, Arguing That Nearly Every State-Law Tort Claim Is Preempted Under *Garmon*. They Would Upset The Delicate Balance Between State Regulation Of Traditionally Tortious Activities And Federal Regulation Of Unfair Labor Practices.

Petitioners spuriously accuse the Ninth Circuit of fashioning a new test for *Garmon* preemption. In fact, it is Petitioners who propose to fashion a radically new approach to *Garmon* preemption, if this Court were to grant the writ. Petitioners' novel idea that employers cannot communicate with employees outside of collective bargaining with the union is contrary to congressional intent. *See* NLRA § 8(c). The corollary to petitioners' proposal is that all employer communications with employees except through their unions are unfair labor practices. That broad departure has no basis in the labor laws.

In *Metropolitan Life*, 471 U.S. at 755 the Court found that Congress had no intent to interfere with minimum state labor standards which "affect union and nonunion employees equally,

and neither encourage nor discourage the collective bargaining processes. . .". *See also, id.* at 757 ("the Court has recognized that it 'cannot declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States' ").

The California anti-fraud statute is such a minimum standard of behavior that does not interfere with the collective bargaining scheme. Indeed, the applicable statutes under which respondents sue are titled under "Obligations Imposed By Law", "Without Contract. . .". Cal. Civ. Code §§ 1708-1711. These California laws have been in effect since 1872. If this Court now were to grant certiorari and adopt petitioners' proposed expansion of *Garmon*, the states' jurisdiction over matters traditionally regulated would be eliminated. That result would grossly distort the principles of federalism underlying the labor laws.

CONCLUSION

No principle of law relating to federal preemption of state-law claims under either § 301 of the LMRA or the *Garmon* doctrine would be clarified by granting a writ of certiorari in this case. To the contrary, granting certiorari here would provoke widespread uncertainty, if not anxiety among the lower courts in their application of the clear mandates of *Lingle* to claims of § 301 preemption. Petitioner' claims of conflict among the Circuit Courts of Appeal in application of *Garmon* preemption is specious. Consideration of this case would add nothing of substance to this Court's jurisprudence. Denial of the Petition for Writ of Certiorari is the only viable option before the Court, unless the Court should wish to revisit all the basic principles of this field. Thus, respondents respectfully request such denial.

Respectfully submitted,

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